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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re DMCA Sec. 512(h) Subpoena
to Twitter, Inc.

Case No.: 20-mc-80214 VC

**NOTICE OF MOTION AND
MOTION OF PUBLIC CITIZEN
FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE IN
SUPPORT OF NEITHER PARTY**

Date: May 12, 2022
Time: 10:00 AM
Dept: Courtroom 4, 17th Floor
Hon. Vince Chhabria

Please take notice that Public Citizen will move for leave to file a brief as amicus curiae relating to Magistrate Judge Donna M. Ryu’s order granting Bayside’s motion to compel and denying Twitter’s motion to quash (DN 21). Pursuant to this Court’s Order (DN 26) establishing a briefing schedule in this case, Public Citizen seeks leave to file an amicus curiae brief supporting neither party. The proposed brief is being e-filed as an exhibit to the motion. Before filing, counsel for amicus conferred with counsel for both parties. Twitter consents to the filing. Bayside reserves judgment because it has not seen the proposed brief and may wish to file a response to the proposed amicus brief insofar as the brief is contrary

1 to Bayside's position, and because Twitter was not willing to grant unconditional consent
 2 to Bayside's possible desire to file such a response.

3 No party has provided any support to Public Citizen for filing of the brief. Nor has
 4 any party or counsel for any party played any role in the drafting or editing of the proposed
 5 brief.

6 **Interest of Amicus Curiae**

7 Public Citizen, Inc., is a public interest organization based in Washington, D.C. with
 8 members in each of the 50 states. Since its founding in 1971, Public Citizen has encouraged
 9 public participation in civic affairs, and has brought and defended numerous cases involving
 10 the First Amendment rights of citizens who participate in civic affairs and public debates.

11 Of particular relevance here, Public Citizen has appeared as amicus curiae in cases
 12 concerning subpoenas seeking to identify authors of anonymous Internet communications.
 13 The courts in these and other cases have adopted slightly different versions of a standard for
 14 deciding such cases that was originally suggested by Public Citizen as amicus curiae and
 15 adopted by the New Jersey Appellate Division in *Dendrite v. Doe*, 775 A.2d 756 (N.J. App.
 16 2001). Other cases where Public Citizen has appeared as amicus curiae to address the test
 17 for identifying anonymous speakers include *Gunning v. Doe*, 159 A.3d 1227 (Me. 2017);
Thomas M. Cooley Law School v. Doe I, 833 N.W.2d 331 (Mich. App. 2013); *In re Indiana*
Newspapers, 963 N.E.2d 534 (Ind. App. 2012); *Mortgage Specialists v. Implode-Explode*
Heavy Industries, 999 A.2d 184 (N.H. 2010); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App.
 20 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); and *Fitch v. Doe*, 869 A.2d 722 (Me.
 21 2005). In each of the above cases other than *Gunning* and *Mortgage Specialists*,
 22 undersigned counsel argued before the appellate panel, urging adoption of the *Dendrite* test.
 23 Public Citizen has also filed briefs as amicus curiae in several cases in this District
 24 presenting this issue, including *Music Group Macao Com. Offshore Ltd. v. Does*, 82 F.
 25 Supp. 3d 979, 981 (N.D. Cal. 2015), *Ron Paul 2012 Presidential Campaign Committee v.*
Doe, No. 3:12-cv-00240-MEJ (N.D. Cal. Mar. 8, 2012), and *Art of Living v. Doe*, 2011 WL
 27 5444622 (N.D. Cal. Nov. 9, 2011).

1 **Public Citizen's Proposed Amicus Brief Will Aid the Court in Deciding This Case.**

2 Public Citizen submits this amicus brief in support of neither party to address the
 3 proper way to assess the balance between the First Amendment right to speak anonymously
 4 and the right to enforce claims that the anonymous speech in this case is actionable. Public
 5 Citizen agrees with Twitter and its amici that platforms such as Twitter have standing to
 6 assert the First Amendment rights of their users. We also agree that the *Dendrite* balancing
 7 test often applied in this District in cases such as *Highfields Capital Mgmt. v. Doe*, 385 F.
 8 Supp.2d 969 (N.D. Cal. 2005), rather than the test of *Sony Music Entertainment v. Does 1-*
 9 *40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), supplies the proper legal standard. But in
 10 important respects, Public Citizen disagrees with Twitter and its amici about how to apply
 11 the final prong of the *Dendrite* standard, under which a court balances the rights of the
 12 prospective plaintiff and the speaker's First Amendment right to speak anonymously.

13 Twitter and its amici argue that, under the *Dendrite* balancing prong, either a party
 14 seeking discovery bears the burden of making a showing at the balancing stage, or the mere
 15 fact that disclosure would strip the Doe of her anonymity is enough to strike the balance
 16 against identification. The proposed brief explains that, properly applied, the balancing
 17 stage of the analysis—which is reached only after a party claiming that the anonymous
 18 speech was wrongful has submitted both legal argument and evidence sufficient to show that
 19 it has a tenable basis for claiming a violation of its rights—provides an opportunity for
 20 either the party seeking enforcement of a subpoena and the party seeking to preserve
 21 anonymity to point to any special considerations that might warrant enforcing or denying
 22 enforcement of a subpoena that differs from the standard subpoena case. In addition, the
 23 proposed brief discusses the type of interests that might be presented here, without taking
 24 any position about how the Court should strike the *Dendrite* balance here.

25 Public Citizen believes that its extensive experience in formulating and developing
 26 the *Dendrite* standard, and in arguing to courts in other jurisdictions about how the standard
 27 should be applied, may be of substantial assistance to the Court as it decides whether to
 28 follow other judges in this District in adopting that standard, and, if so, how to apply the

1 standard.

2 **CONCLUSION**

3 The Court should grant leave for Public Citizen to appear as amicus curiae and to file
4 the proposed amicus brief. The Court should give Bayside an opportunity to respond to this
5 brief before Twitter's reply brief is due.

6 Respectfully submitted,

7 /s/ Paul Alan Levy
8 Paul Alan Levy (pro hac vice sought)
9 Public Citizen Litigation Group

10 /s/ Phillip R. Malone
11 California Bar No. 163969
12 JUELSGAARD INTELLECTUAL
13 PROPERTY AND INNOVATION CLINIC

14 Attorneys for Public Citizen

15 April 4, 2022